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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

26

EDWARD B. PRYOR and EDWARD F.
KEARNEY, as Receivers of the
WABASH RAILROAD COMPANY,

Petitioners.

vs.

ALLEGA WILLIAMS,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

JAMES L. MINNIS,
N. S. BROWN,

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Railway Exchange Building,
St. Louis, Missouri.

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KEARNEY, as Receivers of the
WABASH RAILROAD COMPANY,

Petitioners,

vs.

ALLEGA WILLIAMS,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

STATEMENT.

This case is before the Court on *certiorari* to the Supreme Court of the State of Missouri to review the decision of said Court affirming a judgment against petitioners and in favor of respondent in the sum of \$5,000.00, in the case wherein Allega Wil-

liams was plaintiff and your petitioners were defendants.

Respondent's cause of action is based upon the Employers' Liability Act. His suit was originally filed in the Circuit Court of Chariton County, Missouri, and on the trial thereof the jury returned a verdict, and judgment was entered in his favor for the sum stated. In due time petitioners appealed the case to the Kansas City Court of Appeals pursuant to local statute. Thereafter said Court of Appeals rendered its decision in the case, reversing the judgment of the trial Court, and held that respondent had, in the circumstances shown by the evidence, assumed the risk of the injuries received under the rules of the common law as adopted and enforced by the Federal Courts (Pt. Rec., p. 84, *et seq.*). Thereupon respondent filed his motion for rehearing in said Court of Appeals upon the sole ground that said Court erred in giving effect to the doctrine of assumption of risk in accordance with the Federal rule, contrary to the rule of decision adopted by the Supreme Court of the State of Missouri in a prior case, to wit, *Fish v. Chicago, Rock Island & Pacific Railway Co.*, 263 Mo. 106, wherein said Supreme Court held that the defense of assumption of risk, in a cause of action based on the Federal Employers' Liability Act, should be given effect in accordance with the rules of the common law as adopted and enforced

by the Supreme Court of said State, and not by the rule of the Federal Courts (Pt. Rec., p. 90). Thereafter the said Court of Appeals overruled respondent's motion for rehearing, but certified the cause to the Supreme Court of said State pursuant to local practice, because one of the Judges of said Court of Appeals considered their opinion to be in conflict with the decision of the Supreme Court of Missouri in the Fish case, *supra* (Pt. Rec., p. 95). In due time the Supreme Court of the State rendered its decision in the cause, wherein they reversed the decision of the Court of Appeals and reaffirmed the doctrine previously announced by them in the Fish case, *supra*, by stating in language unmistakable that the defense of assumption of risk in cases tried in the courts of that State and arising under the Federal Employers' Liability Act should be given force and effect—and such force and effect only—as that doctrine is limited by the rules of the common law as adopted and enforced by said Court; and expressly refused to follow and apply the rule of the Federal Courts with respect to that defense in such cases. By this opinion (Pt. Rec., p. 97, *et seq.*) the said Supreme Court announced their doctrine that the employe never assumes the risk of injury where the evidence tends to show that the employer failed in his duty to furnish the employe a reasonably safe place, or reasonably safe tools or

appliances with which to perform the work, even though the employe at the time of entering the employment knew of such defects and the risks arising therefrom, or the defects and risks were so obvious to the employe that it could be presumed that he had knowledge thereof and appreciated the danger.

The statement of facts as found by the Kansas City Court of Appeals was adopted by the Supreme Court of Missouri as the basis for its decision. As this statement fairly sets forth the nature of the pleadings as well as the facts adduced by the evidence on the trial of the case, we here set it forth (Pt. Rec., pp. 97-100).

“This is an action for damages for personal injuries plaintiff alleges he sustained in consequence of negligence of defendants, his employers, who, at the time, were Receivers of the Wabash Railroad Company.

Plaintiff, a laborer, was employed in the work of tearing down a bridge on the road near Ottumwa, Iowa, and was attempting to draw a bolt from a bridge cap with a clawbar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground, a distance of twelve feet. The petition alleges that said clawbar was caused to slip on said bolt and the plaintiff was caused to be hurt and injured by reason of the claws on said bar having become battered and worn to such an extent that

they would not take a firm hold on the bolt that was being drawn and that because of such battered and worn condition of said claws, the said clawbar was rendered dangerous and not reasonably safe for the work in which plaintiff was engaged * * * and plaintiff, without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said clawbar, and did not know that the same was unsafe for use in drawing said bolt,' and the specific negligence averred is that defendants 'negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe clawbar with which to work, and negligently furnished him a clawbar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the plaintiff was engaged at the time he was injured,' etc.

The defenses interposed by the answer are a general denial and pleas of assumed risk and contributory negligence. The jury returned a verdict for plaintiff for \$5,000.00, and after their motions for a new trial and in arrest were overruled, defendants appealed.

The pertinent facts disclosed by the evidence of plaintiff may be stated as follows: Plaintiff, who was 21 years old, and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of 'helping build steel bridges and taking down old ones.' Shortly be-

fore his injury the foreman in charge of the work of tearing down an old bridge ordered plaintiff to draw a certain drift bolt, which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut out the wood from around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the clawbar, which was one of the tools provided by defendants, and, so far as the evidence discloses, the only clawbar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the clawbar which rested on the cap and served as the fulcrum. On the first application of the power exerted by the plaintiff who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then, by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws so that the next application of power would be exerted at the place where the bolt was being held in that grip. The men called this inching process 'Arkansawing the bolt,' and the evidence of plaintiff tends to show that such was the customary, as well as the most expeditious, method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel

after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and he held thereby from slipping. Plaintiff states that in 'Arkansasawing the bolt' he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

"Further, plaintiff states, that to discover the defect required the inspection of the under side of the tool, and that in obeying the order of the foreman to draw the bolt he did not pause to make such inspection, but proceeded to use the tool without any but a casual inspection of its top surface, which did not reveal the presence of the defect. The railroad on which plaintiff was working was engaged in interstate commerce, and the case was properly tried by both parties on the theory that the cause of action, if any, incurred to plaintiff, fell within the purview of the Federal Employers Liability Act."

To the foregoing statement there should be added the following additional statement of facts made by the Kansas City Court of Appeals (Pt. Rec., p. 89):

"The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff. A servant is not held to the duty of making a critical or ex-

tensive inspection of places or tools, but it is expected to be ordinarily attentive to his work and to make such discoveries as ordinary attention under the circumstances would have revealed.

“The clawbar was battered and worn, and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it.”

In overruling the decision of the Kansas City Court of Appeals, the Supreme Court of Missouri, in the course of its opinion, said:

“In the Fish case, *supra*, we further held that as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common-law rule, and to this doctrine we now adhere. Not only so, but we say now in plain terms what was inferentially said in the Fish case, and that is, by the common-law rule, we mean the rule of the common law as it has been announced by the Missouri courts. That rule is, that the servant never assumes a risk where such risk is the outgrowth of the master's negligent act.” (Pt. Rec.,

p. 105.) “* * * Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are not as yet convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute (Employers Liability Act), wherein assumption of risk could be invoked as a defense, that such assumption of risk was that of the common law as interpreted by this Court, in cases tried in our own courts. As this Court interprets the common law, there can be no assumption of risk occasioned by the negligence of the master. We find no Federal case discussing the right of this Court to apply its common-law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we cannot apply the common-law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases—i. e., that the servant never assumes a risk which is the outgrowth of the master’s negligence, and, further, that if such servant remain in a glaringly unsafe place or use a glaringly defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master.” (Pt. Rec., pp. 107, 108.)

The rule of decision laid down by the Supreme Court of Missouri in the case at bar is not in accord with the rule of the common law as interpreted and

applied by this Court with respect to the scope and effect of the doctrine of assumption of risk as a defense, in cases arising under the Federal Employers Liability Act.

Therefore, the questions involved in the present review may be thus stated:

(1) Is the defense of assumption of risk, in a suit brought in a state court on a cause of action arising under the Federal Employers Liability Act, to be given effect according to the applicable principles of the common law as adopted and enforced by this Court; and is it the duty of the courts of the several states, in such circumstances, to follow such Federal rule of decision in passing judgment on such defense?

(2) Did the Supreme Court of Missouri err in its construction of said act with respect to the scope and effect of the defense of assumption of risk invoked by petitioners in the case at bar?

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Missouri erred in refusing to give effect to petitioners' defense of assumption of risk according to the rule of the common law as adopted and enforced by this Court.

2. The said Supreme Court erred in restricting and limiting petitioners' defense of assumption of risk according to the rule of local law adopted by said court.

POINTS AND AUTHORITIES.

I.

By the rule of the common law as adopted and enforced by this Court, a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. And the defense of assumption of risk according to the rule of common law is available in a case under the Federal Employers' Liability Act, except in the circumstances described in section 4 of the act.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492;

Jacobs v. Southern Ry. Co., 241 U. S. 229;

Chesapeake & Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 313;

Erie R. R. Co. v. Purucker, 244 U. S. 320, 324;

Boldt v. Penna. R. R. Co., 245 U. S. 441, 445.

II.

The defense of assumption of risk in actions under the Federal Employers' Liability Act is a matter of substance and not subject to control by the statutes or the local rule of law adopted by the courts of the several States. It is the duty of the courts of the several States to give effect to the defense of assumption of risk, in actions under said act, in accordance with the

rule of the common law as adopted and enforced by this Court.

Seaboard Air Line Ry. v. Horton, *supra*;
Atchison & Topeka Ry. Co. v. Harold, 241 U. S.
371, 377;

New York Central R. R. Co. v. Winfield, 244
U. S. 147, 150;

New Orleans R. R. Co. v. Harris, 247 U. S. 367,
371.

III.

The decision of the Supreme Court of the State of Missouri in the case at bar is erroneous because in conflict with the ruling decisions of this Court with respect to the scope and effect of the defense of assumption of risk.

See Opinion Supreme Court Missouri (Printed Rec., p. 97 *et seq.*).

ARGUMENT.

Respondent, as we have seen, sued petitioners in the Circuit Court of Chariton County, Missouri, to recover damages for personal injuries sustained by him while in petitioners' employ as a bridge carpenter. The action was brought under the Federal Employers' Liability Act of April 22, 1908, as amended. At the time of the accident respondent was engaged in pulling what is known as a drift bolt from the timbers of a wooden bridge forming a part of the interstate line of railroad of which petitioners were receivers. In pulling the drift bolt respondent was using a tool known as a clawbar furnished to him by petitioners for that purpose. His petition alleged that the claws of the bar with which he was working were battered and dull, and, in using the clawbar to pull the drift bolt, the claws of the bar slipped from the bolt, causing plaintiff to fall a distance of approximately twelve feet, causing the injuries upon which his claim for damages is based.

The trial of the case resulted in a judgment for respondent. On appeal of petitioners to the Kansas City Court of Appeals of Missouri this judgment was reversed for the reason that "the defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff. . . . The clawbar was battered and worn and a mere look

at the claws would have disclosed the battered rounded edges, and would have proclaimed to the most common understanding that such edges would not be made to take a firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which in the course of use would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it." (Pt. Rec., p. 89.)

Thereupon respondent filed in the Court of Appeals his motion for rehearing, alleging as reasons therefor that "Respondent is denied the right to recover in this case on the theory that the Federal rule of assumption of risk must be followed by this Court," and "that the decision of the Court of Appeals was in conflict with the decision of the Supreme Court of Missouri in the case of *Fish v. R. R.*, 263 Mo. 106, where it was held 'that the meaning and effect of the United States Supreme Court's decision in the *Horton* case, wherein it is said the matter was left 'open to the ordinary application of the common law rule,' meant the common law rule as interpreted and enforced in the respective states' " (Pt. Rec., pp. 90, 91).

Thereafter, pursuant to the local practice, the Court of Appeals overruled respondent's motion for rehearing, and certified the case to the Supreme Court of Missouri for the reason that, in the opinion of one of the Judges, the decision was in conflict with a

prior decision of said Supreme Court in the Fish case, *supra* (Pt. Rec., p. 95). In due time the Supreme Court of Missouri rendered its decision and judgment in the case, reversing the decision of the Kansas City Court of Appeals, and affirmed the judgment of the trial court (272 Mo. 613, Pt. Rec., pp. 97 *et seq.*).

In reversing the opinion of the Court of Appeals, the Supreme Court held:

(1) That under the rule of the common law, as interpreted and applied by the Missouri courts, the servant never assumes a risk that is the outgrowth of the master's negligence.

(2) That where the servant knows of the defect in the machinery or appliances furnished by the master, and appreciates the risk that is attributable to it, and continues in the employment without objection or without obtaining from the master or his representative an assurance that the defect will be remedied, the servant is to be deemed guilty of contributory negligence.

(3) That under the Federal statute the contributory negligence of respondent in continuing to use the defective claw-bar with knowledge of the defect and appreciation of the risk arising from its use, did not bar a recovery, nor did respondent, because of such contributory negligence, assume the risk occasioned by petitioners' negligence in furnishing to respondent the defective claw-bar.

In the course of the opinion, the Supreme Court said:

"Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are as yet not convinced that we were wrong in the *Fish* case when we said that in the class of cases under the Federal statute, where the assumption of risk could be invoked as a defense, such assumption of risk was that of the common law as interpreted by this court, in cases tried in our court. As this court interprets the common law, there can be no assumption of risk occasioned by the negligence of the master. We find no Federal case discussing the right of this court to apply this common law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we cannot apply the common law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the *Fish* and previous cases, i. e., that the servant never assumes a risk which is the outgrowth of the master's negligence; and, further, that if such servant remained in a glaringly unsafe place, or used a glaringly defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, and has not assumed the risk occasioned by the negligence of the master."

Obviously the rule of decision adopted by the Supreme Court of Missouri is in conflict with the com-

mon law rule of assumed risk, as adopted and enforced by this Court, where the rule is well settled "that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him (*Boldt v. Penna. R. R.*, 245 U. S. 441, 445 and 446, and other cases cited under Point I, *supra*).

Therefore it remains only to be considered whether the Supreme Court of Missouri erred in applying to petitioners' defense of assumption of risk the rule of the common law as restricted and limited by the decisions of the Missouri courts.

This court has repeatedly stated that "in proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts" (*New Orleans and N. E. R. R. v. Harris*, 247 U. S. 367, 371, and cases cited).

It was therefore the clear duty of the Supreme Court of Missouri to interpret and apply the defense of assumption of risk in this case in accordance with the rule of the common law as interpreted and applied by this court. Previous decisions of this court seem to settle the question.

In *Seaboard Air Line v. Horton*, 233 U. S. 492, one of the principal questions for decision was whether a statute of North Carolina making it the absolute duty of the employer to furnish his employe with safe

machinery, ways and appliances with which to perform his duties abrogated the defense of assumption of risk in actions brought under the Federal Act. The trial Court instructed the jury in line with the local statute. In holding that the trial court erred in this respect, this Court said, *l. c.* 504:

“In these instructions the trial Judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employers’ liability to employes in interstate transportation by rail, all said laws upon the subject are superseded. (Second Employers’ Liability Cases, 223 U. S. 155.)”

In *New Orleans & N. E. R. R. v. Harris*, 247 U. S. 367, the question for decision was whether the Supreme Court of Mississippi erred in giving effect to the rule of evidence under the Mississippi statute known as the *prima facie* statute, in a case involving liability under the Federal Employers’ Liability Act. This Court denied the right of the employe to invoke the provisions of the local statute, and said:

“In proceedings brought under the Federal Employers’ Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal

courts, and negligence is essential to recovery.
* * * These established principles and our holding in *Central Vermont Ry. Co. v. White*, 238 U. S. 507-511-512, we think make it clear that the question of burden of proof is a matter of substance, and not subject to control by laws of the several states.”

The cases just noticed involved the applicability of local statutes to actions arising under the Federal Act; but it is manifest that the same principles apply to rules of local general law adopted and enforced by the courts of the several states. Thus, in *Atchison & Topeka Ry. Co. v. Harold*, 241 U. S. 371, the question for decision was whether the Supreme Court of the State of Kansas erred in applying the local rule of law to determine the rights of the holder of an interstate bill of lading, when such local rule was in direct conflict with the general commercial law on the subject as repeatedly settled by this Court, and it was held to be the duty of the courts of the several states to determine the rights of a holder of such a bill of lading in accordance with the general commercial law on the subject as interpreted and applied by this Court. In the course of the opinion this Court said, *l. c.* 377:

“Whether, in the absence of legislation by Congress, the attributing to an interstate bill of lading of the exceptional and local character-

istic applied by the Court below in conflict with the general commercial rule constituted a direct burden on interstate commerce, and was, therefore, void, need not now be considered. This is so because, irrespective of that question, and indeed, without stopping to consider the general provisions of the Act to Regulate Commerce, it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (Act of June 29, 1906, c. 3591, Section 734, Stat. 593), was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which, in the nature of things, exclude state action.”

* * * * *

“Indeed, in the argument it is frankly conceded that as the subject of a carrier’s liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because ‘Congress has legislated relative to the one, but not relative to the other’. But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of re-

sponsibility embraced by the Act of Congress carried with it necessarily the incidents thereto."

In *Jacobs v. Southern Railway* (241 U. S. 229), this Court re-examined the doctrine laid down in the *Horton* case, *supra*, with respect to the scope and effect of the defense of assumption of risk in actions brought under the Federal Act. In that case the Railway Company contended that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. Plaintiff, on the other hand, insisted that such knowledge and conduct amounted, at most, to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Plaintiff contended with great earnestness for an application of a modified rule of the common law which would exclude the defense of assumption of risk in such cases occasioned by the master's negligence, but this Court overruled the contention and said:

"We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language and makes it express one meaning when it intended another."

It is clear from a review of the foregoing cases that the decision of the Supreme Court of Missouri in the instant case is in conflict with the ruling decisions of this Court on the question of the scope

and effect to be given the defense of assumption of risk in actions arising under the Federal Employers' Liability Act; and that it was the clear duty of the Missouri Court to give effect to petitioners' defense of assumed risk in the case at bar in accordance with the common-law rule as interpreted and applied by this Court. Obviously the prime object of the Federal Act was to bring about a uniform rule of responsibility as to interstate commerce in actions growing out of injuries to employes of railroads while engaged in such commerce. The Court well knows that in many of the states the common-law rule of assumption of risk, as applied by this Court, is in full force and effect, whereas in many of the other states such common-law rule has been modified either by state statutes or by rules of decision of the courts of those states. The only way a uniform rule of responsibility can be brought about in such cases is for this Court to place upon the courts of the several states the duty and responsibility of enforcing the Federal Act, and the necessary incidents thereto, in accordance with the rules adopted and applied in such cases by this Court.

It is therefore respectfully submitted that the decision of the Supreme Court of Missouri in this case is erroneous and this judgment should be reversed.

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IN THE
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ALLEGA WILLIAMS,

Respondent.

BRIEF ON BEHALF OF RESPONDENTS

STATEMENT.

We adopt the statement made by the Kansas City Court of Appeals as far as contained in Petitioners Brief beginning at the middle of page 4 and ending with the paragraph on

page 7 which closes with the words, "Federal Employers Liability Act," with the following additions.

The clawbar was furnished by the master for the use of the entire bridge gang and was not in the individual custody nor for the individual use of the Plaintiff and it was the only clawbar on the job (p. 20). Two of Defendants' witnesses testified that it was the duty of the foreman to inspect this tool and he did inspect it. The foreman said that he inspected the tool and it was in a reasonably safe condition and was not made for any use which required that the edges of its claws be sharp and that "Arkansawing" was not a usual and ordinary or safe method of drawing a drift bolt.

Two of Defendants' witnesses, experienced bridgemen who have worked in this gang and with this tool for two and four years, respectively, had not discovered the defective condition of the bar until they examined it while on the stand at the trial, at which time they admitted its worn and battered condition.

Defendants contended below that the tool was not defective, but was reasonably safe.

At the trial below, the Defendants asked the Court to give thirteen instructions, of which the Court refused three, gave one as modified and gave nine as asked. These instructions, set out in full in the transcript at pages 73 to 79 and in our argument, show clearly that the trial Court submitted the case to the jury, on Defendants theory of contributory negligence and assumption of risks, and that was the Federal doctrine and not the Missouri doctrine.

POINTS AND AUTHORITIES.

I.

If the trial court correctly instructed the jury on the

assumption of risks, giving full scope to the Federal doctrine and not limiting petitioners defense of assumption of risk to the Missouri doctrine, it is wholly immaterial what views the Supreme Court of Missouri may have expressed in regard to the relative merits of the Federal and Missouri rules, or in regard to what the trial court should have done.

II.

If the trial court instructed the jury upon the Defendants (Petitioners) own theory of assumed risk, it is quite immaterial whether that theory was sound or not, and equally immaterial what the Supreme Court of Missouri may have considered the true rule.

III.

The assignment of an error to the Supreme Court of Missouri for refusing to apply the Federal doctrine of the assumption of risks, when in fact the trial court did apply the Federal rule (or at least the Defendants' conception of the Federal rule) does not properly raise the question as to whether the trial court correctly instructed the jury on the defense of the assumption of risk.

IV.

When a young man of very limited experience in bridge work, is told by his foreman, who is close at hand while the work is being done, to do a certain piece of work which requires the use of a clawbar which is furnished by the employer for the use of all the members of the bridge gang, and is not in the individual custody and for the individual use of the servant, which tool the employer makes it the duty of the foreman to inspect for defects; and where the evidence shows

that the defects of the tool were not so obvious as to be discernable by a mere casual inspection, but might have been discovered by a deliberate inspection of the tool, and the servant assuming that the tool was reasonably safe, and, having no actual knowledge of its defective condition, used the tool and was injured as a result of its defective condition and his own negligence, the trial court properly submitted the defense of the assumption of risk to the jury, and did not err in refusing to direct a verdict for the master.

V.

The record shows that the judgment was for the right party and therefor it will not be disturbed.

Chicago R. I. & P. Ry. Co. vs. Ward, 40 Supreme Court Reporter 275.

ARGUMENT.

Petitioners only specification of error is that the Supreme Court of Missouri erred in giving effect to petitioners defense of the assumption of risk according to the Missouri rule instead of according to the Federal rule. (Petitioners Brief p. 11.)

Petitioners sole contention here is that the Supreme Court of Missouri applied the Missouri rule of assumption of risks instead of the Federal rule by which the servant is held to have assumed not only the risks ordinarily incident to the employment, but also those risks growing out of the master's negligence which are fully known to the servant or are so glaringly obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them, and hence the judgment should be reversed.

Our answer to petitioners contention is that the Federal rule of the assumption of risks was applied by the trial court, and the case was properly submitted to the jury upon the petitioners own theory.

If the record bears us out in this statement, then it is a question of purely academic interest and of no practical importance to this case, what the views of the Supreme Court of Missouri may be in regard to the true rule of the assumption of risks, or in regard to whether the Federal rule or the Missouri rule should be applied or was applied.

We now turn to the record for proof of our contention.

The plaintiffs instructions clearly recognized that the jury might find against the plaintiff on the ground that the Plaintiff assumed the risks of his employment, and the Plaintiff's general instruction (transcript p. 70) expressly refers to that defense.

The Defendants' conception of the doctrine of assumption of risks was given full recognition and their defense was submitted on their own theory as a reading of the instructions will clearly demonstrate. Defendants offered 13 instructions, of which those numbered 5, 6½, 9 and 10 do not relate to the assumption of risk or to contributory negligence. All of the instructions offered by them which touch upon either doctrine were as follows:

I (given).

The court instructs the jury that if you shall find and believe from the evidence in the case, that the work in which plaintiff was engaged at the time of his alleged injury, and the clawbar with which it was necessary for him to work while so engaged, were both simple, and that the plaintiff knew of any danger to him, if danger there was, in the prosecution of such work with the clawbar used by him, then what-

ever danger there may have been to plaintiff in using said clawbar, as he did, was assumed by him and he cannot recover.

2 (given).

The court instructs the jury that it was not the duty of defendants to furnish plaintiff with the newest, safest and most approved tools, and appliances with which to work, but that their only duty was to furnish reasonably safe tools and appliances. If, therefore, you shall find from the evidence that defendants did provide for plaintiff's use in the prosecution of the work in which he was engaged at the time of his alleged injury, reasonably safe and suitable tools, the character of the work in which he was engaged being considered, then there was no negligence committed by the defendants, and you must find for them.

3.

(Refused as offered, but italicized portion at the end added by the court and the modified instruction given by the court.)

If the jury shall find from the evidence that the usual ordinary and safe way in which to perform the work in which plaintiff was engaged at the time of his alleged injury, was for the workmen to place a block under the heel of the claw bar with which he was working in order that the claw bar might catch against the head of the bolt, and, if you shall further find that it was not reasonably safe, the circumstances considered, for the workmen to depend upon the claw bar catching the side of the bolt, and holding by reason of its contact with the side of the bolt, and, if you shall further

find from the evidence, that plaintiff was attempting to draw said bolt by the latter and less safe method, and was thereby injured, then plaintiff was himself guilty of contributory negligence.

You are further instructed in this connection, that if you shall find that the manner in which plaintiff was performing the labor in which he was engaged at the time of his injury, was not a seasonably safe method, the circumstances under which he was working considered, and that plaintiff himself realized said fact at the time he was undertaking the performance of the labor in that manner, and voluntarily chose to perform the labor in that manner, rather than to use the safer method of blocking up under the claw bar so as to enable him to lift with the claw bar holding against the head of the bolt, then, and in that event, plaintiff assumed all the risks of injury incident to the manner in which he was performing said labor, and the defendants are not liable for the injury resulting therefrom, "and such fact will be considered by you in determining the amount of plaintiff's recovery, if any, under all the instructions."

4 (given).

The court instructs the jury that if the plaintiff undertook to perform the labor in which he was engaged at the time of his alleged injury with the claw bar in question, without any direction from his foreman as to the tool which should be used by him in doing such work, and that plaintiff selected the claw bar in question with which to do said work, and that whatever defects, if any there were in said claw bar, were apparent to him, then and in that event, plaintiff cannot recover, even though you may further find that the claw bar in question was not in a reasonably safe condition with which to perform the labor in which plaintiff was engaged.

6 (given).

The court instructs the jury that if you shall find that plaintiff was injured by reason of the claw bar with which he was working slipping on a bolt or drift pin, and causing him to fall, and if you shall further find that said claw bar slipped because of the manner in which it was being used by the plaintiff, or because said claw bar was dull, or for both of the aforesaid reasons, and not because of any latent or hidden defect, in said claw bar, and if you further find that the condition of the claw bar was apparent to plaintiff at the time then there can be no recovery, and your verdict must be for defendants.

7 (refused).

The court instructs the jury that a claw bar such as was used by plaintiff in this case, is what is known as a simple tool of which the master is not presumed to have greater or superior knowledge than the servant using such tool, and that no duty devolved on defendants to inspect such tool to ascertain its condition before permitting plaintiff to use the same, and you cannot find defendants guilty of negligence for failure to make inspection of said claw bar to ascertain its condition prior to permitting its use by plaintiff in the labor in which he was engaged at the time of his alleged injury.

8 (given).

The court instructs the jury that plaintiff in entering into the employment of the defendants, assumed the danger of all the risks ordinarily incident to such employment, and if you shall find from the evidence that the injury which resulted to him resulted from the danger which was ordinarily incident to the employment in which he was engaged, then

there can be no recovery in this case, and your verdict must be for defendants.

11 (refused).

The court instructs the jury that under the law and all the evidence in the case, your verdict and finding must be for defendants, and may be in the following form:

Allega WilliamsPlaintiff
vs.

Edward B. Pryor, et al.....Defendants

We, the jury, find the issues herein joined in favor of defendants.

.....
Foreman.

12 (refused).

The court instructs the jury that no duty devolved upon defendants to furnish plaintiff with the safest and best, or the newest claw bar that could be provided for his use in the work in which he was engaged, but defendants duty was entirely discharged if they provided him with a claw bar reasonably safe for the purposes for which it was intended to be used.

You are further instructed that "reasonably safe appliances and tools" as used in these instructions, means such appliances and tools as were commonly and ordinarily used in the business in which plaintiff was engaged.

.....
These instructions as asked by the petitioners show that

the Defendants' theory in the trial Court of the doctrine of the assumption of risks which should be applied to this case and upon which the defendants should now stand or fall, is as follows; that plaintiff, entering into the employment of the Defendants, assumed all of the risk ordinarily incident to such employment (instruction 8). Furthermore, if the work in which he was engaged at the time of the injury and the claw bar were both simple, and the plaintiff knew of **any** danger in the prosecution of such work with the claw bar, then he assumed **whatever danger there may have been** in using the claw bar as he did (instruction 1). Furthermore, if the plaintiff undertook to do the work with the claw bar and if the plaintiff selected the claw bar, and if whatever defects it had, if any, were apparent to him, he could not recover because he assumed the risks; and if he was injured by the claw bar slipping on account of the manner in which it was used or because it was dull and not because of any latent defect, and if the condition of the claw bar was apparent to the plaintiff, he could not recover because he assumed the risk (instruction 6).

Defendants' instruction No. 3 which was refused as asked and was modified by the Court by the addition of the italicized matter and given as modified, was to the effect that if the jury should find that the usual safe way to draw out a drift pin was to block up under the heel of a clawbar so that the clawbar always caught against the head of the bolt, and that the process of Arkansawing the bolt was not a reasonably safe method, and that plaintiff was injured as a result of choosing an unsafe method, then he was guilty of contributory negligence, and, if plaintiff realized that the manner in which he was doing the work was not a reasonably safe method and chose the unsafe way, then he assumed the risk incident to the manner in which he was performing the labor and cannot recover. In short, drawing the drift pin by an unsafe method

when he might have followed the usual safe method, is contributory negligence, but doing the same thing with a realization of the risk is assumption of the risk and bars recovery.

This instruction as offered may reasonably be construed to mean either of two things:

1. That using an unsafe method when a usual and safe method is available is contributory negligence provided the servant does not realize the risk, but if he does realize the risk it becomes an assumed risk.

This is absurd on the face of it because there can be no choice without knowledge, and there can be no negligence without knowledge.

2. Or it may mean that the choice of an unsafe method where a safe method may have been known, is at the same time contributory negligence and an assumption of risks of the unsafe method, one of which reduces the damages and the other bars recovery. The fact that the instruction is reasonably susceptible of such an interpretation is ample reason for the court refusing to give it as offered.

However, the Court made an addition to the instruction which adopted the defendants' claim that it was contributory negligence to choose an unsafe method and gave the instruction. The amended instruction is just as sound as the defendants' theory. If it is erroneous, it is defendants' own error adopted by the Court.

As to whether or not the choice of an unsafe method when a safe method is available, is contributory negligence or assumption of risk does not arise in this case and is a question of purely academic interest. The defendants by their instruction No. 3 said that such choice was both contributory negligence and the assumption of the risks. The court therefore had a right to declare it to be either contributory negligence or assumption of risk, and if wrong, the defendant could not complain.

There can be but one other contention made by petitioners which is deserving of attention, and that is the claim that the trial Court erred in not giving, at the close of the case, instruction No. 12, a peremptory instruction to find for Defendants.

Does the application of the Federal rule of the assumption of risks require the Court to peremptorily instruct for Defendants, or should the Court have submitted the question of the assumption of risk to the jury?

Assuming for the moment that this question is brought to this Court by the petitioners' assignment of error (which we seriously doubt) and bearing in mind that petitioners have themselves asked the Court to hold that the choice of an unsafe method instead of the usual safe method is contributory negligence, does the evidence show without contradiction that the defects of the tool were known to the servant or were so glaringly obvious that an ordinarily careful man would have seen them?

The evidence was as follows:

Williams, the plaintiff, a young man 21 years of age, was raised on a farm and lived there until he went to work for the Wabash Railroad as a bridge laborer about three months before the injury. Bill Rickard, the boss, told Williams to draw a drift bolt from a bridge cap. This is done with a clawbar, which is a steel instrument five or six feet long with two claws and a heel at one end. There was a clawbar provided for the work and one only (p. 20) which Williams picked up about the middle, and noticing that it was not the one he had been using, he glanced at it and thought it was all right (p. 20). It seemed to be in a reasonably good condition and he didn't look farther (p. 30). He had never used this bar before.

He took it up by the handle end and made no close examination of the claw end. The boss was there and saw him

working and gave him no warning of the defective condition of the clawbar. A careful examination of the claw end from the underside, shows that it is battered and worn, but that condition would not appear without such an examination (p. 41). The clawbar was in court and exhibited to the jury (p. 41).

Defendants' witness McNown, a bridge builder of experience in Defendants' employ, testified that the worn and battered condition of the clawbar was the result of its use during the last two years (p. 47); that it is now duller than it was at the time of the injury, because of its use since then (p. 44); that the foreman examines the clawbars and when they become worn, orders them cast aside; that witness does not know how much more worn and battered it now is, though the clawbar is before him, because he has never examined it (p. 46).

Defendants' witness Davenport, also an experienced bridge builder, had worked with this clawbar for a long time, but had never examined it and had never noticed the worn and battered condition of the claws (p. 53) until on the witness stand, but when shown the clawbar admits its worn and battered condition.

Defendants' witness Rickard, the bridge foreman, knew the clawbar well. It was witness' duty to inspect the clawbar and the other tools and see that they were reasonably safe, and he did inspect this clawbar and passed it as safe, and would still pass it (pp. 60 and 61); that Plaintiff had used the bar before; that he told Plaintiff to pull the drift bolt; that there is no use to which clawbars are put that requires them to be sharp (p. 57).

Wm. Sailor, Defendants' witness, a bridgeman, testified that clawbars become worn from use; that this clawbar had been in use four years; that it is now more worn than at the time of the accident (p. 65).

Under this evidence the following reasons appear why

the Court should not hold that the defects in the tool were so obvious that the plaintiff either knew or should have known the defects.

The Plaintiff was a young and inexperienced hand who had been engaged in work of this character for less than three months prior to the time of the injury.

The tool was not an individual tool furnished for Plaintiff's individual use and placed in Plaintiff's custody, but it was for the use of the whole bridge gang, under the direction of and in the presence of the foreman.

The defendants had assumed to inspect this tool and the foreman had inspected the tool. We may fairly infer that the fact was known to Plaintiff because he assumed that the tool was free from defects.

That the defects of the tool were not so obvious as to be discernable by a mere casual inspection is shown by the evidence of the Plaintiff and of some of Defendants' witnesses. Defendants' witnesses, McNown and Davenport, both experienced bridge builders who had worked with this tool for a long time, did not know of its condition until they inspected it in the presence of the jury at the trial below, at which time they admitted that it was in a worn and battered condition.

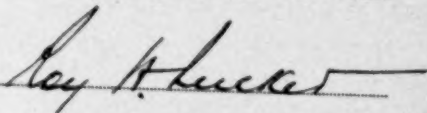
The presence of the foreman who told the Plaintiff to do a thing requiring the use of this tool and the failure of the foreman to caution him in regard to the defects of the tool practically amount to an assurance by the master that the tool was not defective and might be used without inspection.

Furthermore, after Defendants have contended and produced evidence to prove that the tool was not defective but had been inspected and passed as a safe tool, Defendants should not now be heard to say that the defects in the tool which caused Plaintiff's injury were known to the Plaintiff

or were so obvious and glaring that the Plaintiff, as an ordinarily prudent man, should have observed the defects.

Therefore, the Plaintiff did not know the defects and should not be charged with knowledge of the defects of the tool furnished by the Defendants and which caused his injuries, and the trial court did not err in submitting to the jury the question as to whether the Defendants assumed the risk of using the tool.

We respectfully submit the judgment of the trial court should be affirmed.



Counsel for Respondent.